

SERVICE DATE - LATE RELEASE MARCH 12, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 41989

POTOMAC ELECTRIC POWER COMPANY

v.

CSX TRANSPORTATION, INC.

No. 41295¹

PENNSYLVANIA POWER & LIGHT COMPANY

v.

CONSOLIDATED RAIL CORPORATION, ET AL.

Decided: March 12, 1997

On February 20, 1997, in STB Docket No. 41989, complainant, Potomac Electric Power Company (PEPCO), filed a second motion to compel discovery from defendant, CSX Transportation, Inc. (CSXT). This second motion relates back to PEPCO's first request for the production of documents, which was served on January 9, 1997, and included a request that CSXT produce, with respect to coal movements to PEPCO's electric generating facility in Dickerson, MD, all documents encompassing, relating, or referring to: (1) any cost or profitability analyses ever performed; and (2) any costing methodology ever used.² On February 10, 1997, CSXT objected insofar as the requests sought disclosure of the methodologies, assumptions, and cost estimate outputs of its proprietary internal costing system and cost allocation methodologies.

On March 7, 1997, in No. 41295, complainant, Pennsylvania Power & Light Company (PP&L), filed a similar motion to compel from CSXT, Norfolk Southern Railway Company, and Consolidated Rail Corporation, the three defendants. Essentially, PP&L seeks the same information that is being sought by PEPCO, but, in its

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

² In the January 9 request, PEPCO also sought the production of all coal transportation contracts (or letters of understanding with appendices or attachments) entered or agreed to with respect to shipments made (at least in part) after January 1, 1994, where CSXT was an originating, terminating, overhead, or single-line carrier. Subject to the terms of the stipulated protective order, served February 5, 1997, a motion to compel the production of these contracts was granted in a decision served March 3, 1997. PEPCO states that there are a number of other January 9 production requests where production has not yet been completed or the parties are continuing to negotiate. To avoid wasting the parties' and Board's resources, PEPCO asserts that it is reserving the right to seek an order to compel production of these additional materials within 10 days after this production request is completed, or, in the alternative, to serve follow-up discovery requests with respect to any relevant issues.

motion to compel, PP&L narrowed the time frame of its requests to satisfy defendants' objections concerning cost studies prepared in anticipation of litigation.

In anticipation of PP&L filing its motion to compel discovery, CSXT, on February 26, 1997, petitioned the Board to issue a consolidated, expedited initial decision ruling on the merits of the common discovery issue. Alleging that the requests for disclosure of internal railroad costing systems raise recurring legal and policy issues of industry-wide transportation significance and major commercial importance to the individual railroads, it argues that the disclosure issue should be decided by the Board itself, and not an Administrative Law Judge (ALJ).

On March 4 and 7, 1997, respectively, PP&L and PEPCO replied in opposition to CSXT's February 26 petition. Essentially, PP&L and PEPCO argue that consolidation is inappropriate and that, consistent with past practice, all discovery disputes should be referred to an ALJ for a ruling in the first instance. CSXT's petition to consolidate, and its request for an expedited Board decision to resolve common discovery issues, will be granted.

The motions to compel appear substantially similar and the time frames of the two cases are compatible with a consolidated decision. Moreover, neither proceeding has been referred to an ALJ, and it has already been determined in No. 41295 that motions to compel on railroad internal costing issues would follow a separate time track.³ It appears that the discovery motions raise recurring issues that ultimately are likely to come before the Board for resolution. An initial determination of these issues by the Board will speed up the process and minimize the burden on the parties. Accordingly, it appears that the requested consolidation to resolve common discovery issues is appropriate and will not unduly delay either proceeding.

It is ordered:

1. CSXT's petition for a consolidated initial decision on the motions to compel is granted.
2. Replies to the motions to compel discovery relating to the internal railroad costing methodologies and systems are due on March 17, 1997.
3. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

³ See Pennsylvania Power & Light Company v. Consolidated Rail Corporation, Et Al., No. 41295 (STB served Feb. 28, 1997).